Supreme Court, U.S.
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No. 89-30

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JANICE ENDSLEY, EXECUTRIX OF THE
ESTATE OF WILLIAM ENDSLEY, DECEASED
AND JAMES WEYCKER

Petitioners,

-vs-

JOHN YOUNG,

Respondent.

PETITIONERS' SUPPLEMENTAL BRIEF WITH NEW AUTHORITY ON WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit

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January 15, 1990

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Introduction

CONFLICTING FEDERAL COURT DECISIONS SINCE THE FILING OF THIS PETITION (A) DEMONSTRATE A NEED FOR THE SUPREME COURT TO DECIDE WHETHER CONGRESS INTENDED THE LIMITATION ACT TO APPLY TO PLEASURE CRAFT, AND (B) PROVIDE FURTHER PROOF THAT, UNTIL THIS ISSUE IS RESOLVED, SUBSTANTIAL INTERESTS OF LITIGANTS, COURTS, PLEASURE BOAT OWNERS AND USERS, AND THE MARINE INSURANCE INDUSTRY, WILL BE ADVERSELY AFFECTED.

Since the filing of this petition on July 10, 1989, federal courts in the Second and Ninth Circuits have squarely confronted the question of the Limitation Act's applicability to pleasure boats, and have reached opposite results. In In re Myers, 721 F.Supp. 39 (W.D.N.Y. 1989), the Court on October 2, 1989, followed the clear trend of recent decisions and concluded that, notwithstanding earlier decisions in the Second Circuit to the contrary, Congress never intended the Limitation Act to apply to pleasure craft. In Hechinger v. Caskie, No. 88-2525 (9th

Cir. filed November 27, 1989), the Ninth Circuit Court of Appeals, citing In re Young, 872 F.2d 176 (6th Cir. 1989), in an opinion filed on November 27, 1989, a copy of which is included in the appendix hereto, **declined** to follow the trend of recent decisions and held that the Limitation Act is available to owners of pleasure boats. These clearly conflicting decisions provide compelling additional reasons for granting a writ in the instant case.

A. In re Myers.

This case arose out of a collision between two pleasure boats. One was owned by Myers, and was being piloted by his son at the time of the accident. A passenger in the Myers' boat, Lechner, was seriously injured and sued for damages in a New York state court. Myers then filed a petition in the Federal District Court to limit his

liability to the value of the boat, namely, $8,579.

Lechner moved for summary judgment on the grounds that the limitation provisions of Section 183 do not apply to pleasure craft. Chief Judge Telesca, noting that the case required the court to decide whether the Limitation Act, "enacted more than a century ago to protect America's fledgling commercial shipping industry, should be interpreted to include pleasure craft," granted Lechner's motion for summary judgment.

The Court traced the Limitation Act's legislative history from its enactment in 1851 through amendments in 1886, 1935 and 1936, and concluded that "these provisions only apply to large seagoing vessels, and this conforms to Congress's original intent to protect American commercial shipping

. . . therefore . . . the statute does not expressly reach pleasure boats . . . (so) . . . the statute itself does not determine the case." 721 F. Supp. 39, 42. The Myers court, accordingly, followed a growing list of federal courts which either have reached the same result or which have severely criticized the application of the Act as contrary to Congressional intent. (See In re Shaw, 668 F.Supp. 524 (S.D. W. Va. 1987); In re Lowing, 635 F.Supp. 520 (W.D. Mich. 1986; In re Tracey, 608 F.Supp. 263 (D. Mass. 1985); Baldassano v. Larsen, 580 F.Supp. 415 (D. Minn. 1984); Richards v. Blake Builders Supply Inc., 528 F.2d 745 (4th Cir. 1975); Gibboney v. Wright, 517 F.2d 1054 (5th Cir. 1975); and In re Porter, 272 F.Supp. 282, 285 (S.D. Texas 1967).

The Myers court, while acknowledging that "fidelity to the doctrine of stare

decisis is of fundamental importance to the rule of law," refused to follow Second Circuit Court decisions which had applied the Act to pleasure craft on the grounds that these cases "had failed to approach the issue in a reasoned fashion and, therefore, did not constitute precedent binding upon this case." 721 F.Supp. 41, 42. The Court concluded that upon a review of the "applicable case law from this circuit and from the U.S. Supreme Court, I find no authority requiring this Court to hold that the owner of a pleasure boat has recourse to the limitation statute found at 46 U.S.C. Section 183 when he is sued for personal injury . . . allegedly caused by the negligent use of that pleasure boat." 721 F.Supp. 40.[1]

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[1] The District Court in In re Young reached the same decision. Contrary to the suggestion in Respondent's brief opposing certiorari, however, the District Court's

B. Hechinger v. Caskie.

A yacht owner, Hechinger, inexperienced in seamanship, hired an experienced captain to move his yacht up the California coast. When the boat encountered high waves, a crew member, Caskie, who had been hired by the captain, was thrown to the floor of the wheel house and was injured. Hechinger petitioned for limitation of liability. The district court assumed jurisdiction under the Limitation Act and found for Hechinger. On appeal, the Ninth Circuit Court of Appeals, relying upon In re Young, upheld the decision of the trial court.

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decision did not seek to restrict general maritime jurisdiction over pleasure craft. On the contrary, the District Court simply held, as many other courts recently have done, that the Limitation Act was never intended by Congress to shield pleasure craft owners from tort liability in cases which, nevertheless, may be subject to maritime law.

C. Discussion.

Like the conflicting results in In re Young and In re Sisson, 867 F.2d 341 (7th Cir. 1989), which were discussed in Petitioner's brief in support of a writ, these cases are indicative of a body of law which, until this court intervenes, will continue to be confusing and fraught with opportunities for conflicting results and injustice. Should the Limitation Act apply to limit the liability of pleasure boat owners notwithstanding compelling evidence that Congress never intended this result? Does the doctrine of stare decisis obligate courts to apply the Limitation Act to pleasure craft even if prior decisions, according to overwhelming weight of scholarly authority, are demonstrably contrary to Congressional intent? If, as numerous courts and commentators have concluded, the Act was never intended to

apply to pleasure craft, does it not follow, irresistably, that those decisions which have found to the contrary represent examples of "judicial legislation," the very evil which some courts which have applied the Act to pleasure craft have sought to avoid? Does the contention that stare decisis requires courts to reach a result which Congress never intended mean that courts are only free within the penumbra of this doctrine to "judicially legislate" results which perpetuate prior judicial misinterpretations of legislative intent? It it this conundrum which courts, in growing numbers, have sought to escape by refusing to apply the Limitation Act to pleasure craft.

Faced with a choice between a rationale which implicitly legislates an irrational result and one which risks reversal on the grounds that it fails to follow arguably

binding precedent, one court has chosen a different course. In In re Sisson, the Seventh Circuit chose to make satisfaction of the nexus test set forth in Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982), a prerequisite for application of the Act to pleasure boats. And while this approach may, in some cases, serve courts as a means of avoiding application of the Act, it will, in courts which follow In re Sisson, lead inevitably to conflicting decisions which will further add to the unpredictability of litigation within an already badly misshapen body of law.

Conclusion

The instant petition presents the Supreme Court with an opportunity to decide an issue which courts and commentators agree is ripe for determination by this court and which, until it is resolved, will

continue to produce conflicting, contradictory and unjust results.

Respectfully submitted,

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Appendix A

In the Matter of the Complaint of Carlton E. MYERS as the Owner of the Vessel with New York Registration Number 9376JS for Exoneration from or Limitation of Liability, Plaintiff/Petitioner.

No. CIV-89-519T.

United States District Court, W.D. New York.

Oct. 2, 1989.

Owner of 16-foot runabout pleasure boat sought to limit liability for damages resulting from collision. The District Court, Telesca, Chief Judge, held that Limitation of Liability Act did not apply to boat.

Claimant's motion for summary judgment granted and complaint dismissed.

Shipping 204 .

Limitation of Liability Act did not apply to 16-foot runabout pleasure boat. 46 U.S.C.A. App. §183.

Roger G. Preston, Jr., Rochester, N.Y., for plaintiff.

Mousaw, Vidgor, Reeves, Heilbronner & Kroll (Richard A. Dollinger, of counsel), Rochester, N.Y., Nesbitt & Williams (John B. Nesbitt, of counsel), Palmyra, N.Y., for respondent.

DECISION AND ORDER

TELESCA, Chief Judge.

INTRODUCTION

This action arises out of a collision of two pleasure boats on Lake Ontario. Plaintiff seeks to limit his liability for damages resulting from that collision pursuant to 46 U.S.C. App. §183 ("Section 183" or the "Act"). Section 183 provides limitation of and/or exoneration from liability to the owner of a ship under certain circumstances.

Claimant Paul Lechner was given notice of the complaint pursuant to Rule F of the

Supplemental Rules for Certain Admiralty and Maritime Claims, and now moves for summary judgment, stating that §183 does not apply to pleasure boats. I agree, and for the reasons discussed below, grant claimant's motion for summary judgment.

BACKGROUND

On August 20, 1988, plaintiff's vessel, a 16-foot runabout, collided with a 34-foot vessel owned by Roy Vanderbilt, while the two boats were navigating Sodus Bay on Lake Ontario. Plaintiff's son was piloting the boat at the time of the incident. Paul Lechner, a passenger aboard plaintiff's boat, was injured, and brought suit in New York State Court to recover for his damages.

Plaintiff subsequently filed this complaint pursuant to 46 U.S.C. App. §183, alleging that, since the accident occurred without his "privity or knowledge," his

liability, if any, is limited to the value of the boat itself, which he alleges to be $8,579.[1]

Claimant Lechner originally moved for summary judgment in July, 1989, alleging that the limitations provision in §183 does not apply because the acident involved a collision between two pleasure boats. In opposing the summary judgment motion, plaintiff stated that a material issue of fact exists as to whether or not his 16-foot runabout is a pleasure boat. Lechner thereupon withdrew his motion for summary judgment and served interrogatories to determine whether the boat is a commercial or pleasure boat. Upon receipt of the answers to interrogatories from both Myers

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[1] While the record in this case does not state the amount claimed by Lechner as damages, it does allege that Lechner suffered "serious" damages, which the Court presumes exceed the stated value of plaintiff's boat.

and claimant Vanderbilt, stating that their respective boats are pleasure boats, Lechner renewed the motion for summary judgment.

DISCUSSION

This case requires me to decide whether the Act, enacted more than a century ago to protect America's fledgling commercial shipping industry, should be interpreted to include the 16-foot runabout involved in this case. In making that determination, I look first to the plain language of the statute; second, to binding precedent, if any, interpreting that statute; in the absence of dispositive guidance from either of these two sources, I look to the legislative history of the Act. *See Independent Bankers Association v. Marine Midland Bank, N.A.*, 757 F.2d 453, 460 (2d Cir. 1985), *cert. denied*, 476 U.S. 1186, 106 S.Ct. 2926, 91 L.Ed. 2d 554 (1986).

In relevant part, 46 U.S.C. App. §183 provides:

> (a) the liability of the owner of any vessel . . . for any damage . . . done . . . without the privity or knowledge of such owner or owners, shall not exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

The statute does not expressly reach pleasure boats.[2] Thus, the plain language of the statute itself does not determine this case.

Reviewing the applicable case law from this Circuit and from the United States Supreme Court, I find no authority requiring this Court to hold that the owner

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[2] Pleasure boats have been held impliedly included under §183(a), since §183(f) expressly excludes them from subsections (b)-(e) of the statute. *See Petition of Colonial Trust Co.*, 124 F.Supp. 73, 75 (D. Conn. 1954). The language of these latter subsections, however, clearly indicates that they apply only to large seagoing vessels, and, thus distinguishes them from subsection (a). *See Matter of Lowing*, 635 F.Supp. 520, 524 (W.D. Mich. 1986).

of a pleasure boat has recourse to the limitation statute found at 46 U.S.C. App. §183 when he is sued for personal injury and/or property damage allegedly caused by the negligent use of that pleasure boat.

The plaintiff argues that it is "well settled" in this Circuit, that the provisions of the Act apply to pleasure boats. If that were the case, the grant of claimant's motion for summary judgment would require this Court to contradict precedent binding upon it. In considering this issue, the Court acknowledges that fidelity to such precedents, embodied in the doctrine of stare decisis, "is of fundamental importance to the rule of law[,]" *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 494, 107 S.Ct. 2941, 2957, 97 L.Ed.2d 389 (1987), that "any departure from the doctrine of stare decisis demands

special justification[,]" *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed. 2d 164 (1984), and "that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction [since] considerations of stare decisis have special force in the area of statutory interpretation [where] the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989) (citations omitted).

The Supreme Court has had an opportunity to discuss the reach of the Act to pleasure crafts on at least two occasions. *See Coryell v. Phipps (The Seminole)*, 317 U.S. 406, 63 S.Ct. 291, 87 L.Ed. 363 (1943) and *Just v. Chambers*, 312 U.S. 383, 61 S.Ct.

687, 85 L.Ed. 903 (1941). Neither case, however, required the Court to decide the question of whether the Act applies to pleasure boats. Each case rested on the determination of an independent issue (whether privity existed or whether the owner had knowledge of the use of the boat) which, decided in the negative, defeated the claims in their entirety and obviated the need to decide whether the Act applies to plasure boats. Put differently, the Court never had to reach the issue before me in this case.

Related cases from within this Circuit are not more determinative. In *Reading v. Beaudin*, 271 F.2d 959 (2d Cir. 1959), the Court affirmed in a memorandum decision the District Court's order granting a petition for complete exoneration from liability. The District Court had presumed, without so holding, that the Act applied to the

collision between pleasure boats. ("It is true the size of the motor boat is unimportant under the Act and present judicial construction." (*In Matter of Reading*, 169 F. Supp. 165, 167 (N.D.N.Y. 1958).)) In *Petition of Liebler*, 19 F.Supp. 829 (W.D.N.Y. 1937), the Court opined that "the motor boat in question, small though it was and used as it was for pleasure, comes within the meaning of a 'vessel' as used in the limitation statute." *Id.* at 833. The decision cites neither case law nor legislative history to support that opinion.

In *Complaint of Interstate Towing*, 717 F.2d 752 (2d Cir. 1983), the Court similarly presumed that the Limitation Act applies to pleasure boats; the holding of that case, however, turns on a wholly unrelated issue of negligence law.

In *In Matter of Guglielmo*, 704 F.Supp. 352 (E.D.N.Y. 1989), Judge Platt states:

> Claimant urges this Court to follow a recent trend in the First, Sixth, Seventh and Eighth Circuit Courts which has rejected the view that 46 U.S.C. §183(a) applies to pleasure boats . . . [W]e must reject, despite claimant's urging the reent trend . . . as it does not reflect the state of the law in this Circuit.

A review of the cases cited by the Court in *Guglielmo*, however, demonstrates that "the law in this Circuit" does not expressly hold §183 applicable to pleasure boats. In addition to citing *Interstate Towing*, *Guglielmo*, cites *Application of Theisen*, 349 F.Supp. 737, 740 (E.D.N.Y. 1972), in which the Court states: "It is now well established that a petitioner, as owner of a pleasure craft is entitled to avail himself of [§183]," quoting *Petition of Klarman*, 295 F.Supp. 1021 (D.Conn. 1968). Similarly, *Petition of Klarman*

states that, "contrary to claimant's assertion, petitioner as the owner of a pleasure craft is entitled to avail himself of the limitation and exoneration provisions of 46 U.S.C. App. §183(a). This Court has squarely so held [,]" citing *Petition of Colonial Trust Co.*, 124 F.Supp. 73, 74 (D.Conn. 1954). In that case as well, however, the Court merely *presumed* the applicability of §183 to pleasure boats, and more specifically held that there was no exception when pleasure craft were hauled out onto land or were in storage. I find that these cases have addressed questions concerning §183 which merely "lurk in the record, neither brought to the attention of the Court nor ruled upon" in a reasoned fashion, and thus do not constitute precedent binding upon this case. *See Webster v. Fall*, 266 U.S. 507,

511, 45 S.Ct. 148, 149, 69 L.Ed. 411 (1925).

In the absence of a facial statutory directive or of binding precedent, this Court looks to the legislative history of the Act to construe its meaning in this case.

The limitation of liability statute was first enacted in 1851.

> Ship owners of other nations already enjoyed such protection under the laws of their lands, and it was the intent of Congress in passing this legislation to insure that American shipping no longer be at a competitive disadvantage. *See generally, The Maine v. Williams*, 152 U.S. 122, 14 S.Ct. 486, 38 L.Ed. 381 (1894); *Norwich & N.Y. Transport Co. v. Wright*, 80 U.S. (13 Wall) 104, 20 L.Ed. 585 (1871). Senator Hamlin of Maine, who introduced the legislation, explained that it was patterned after English law: "Why not give to those who navigate the ocean as many inducements to do so as England has done? . . . That is what this bill seeks to do, and it asks no more." 23 Cong. Globe 331-32, 31st Cong., 2d Sess. (January 25, 1851).

Baldassano v. Larsen, 580 F.Supp. 415, 417 (D. Minn. 1984).

In 1886, the statute was amended because of the growing commercial importance of inland waterways. *7A Moore's Federal Practice*, para. 215[5] (1988). In addition to allowing ship owners to limit liability on all seagoing vessels, the amended statute permitted owners of "all vessels used on lakes or rivers or in inland navigation, including canal boats, barges or lighters" to limit liability. Because the amendment was drafted in response to the increase of commerce on inland waterways, it signals no change from the initial intent of the statute.

The statute was further altered in 1935 and 1936 when subsections (b), (c), (d), (e), and (f) were drafted. As previously stated, these provisions only apply to

large seagoing vessels, and thus conform to Congress's original intent to protect American commercial shipping.

The Supreme Court has recognized the essentially commercial nature of the Act:

> The Act was adopted primarily to encourage the development of American merchant shipping . . . It is, therefore, crystal clear that the operation of the Act is directed at misfortunes at sea where the losses incurred exceed the value of the vessel and pending freight . . . The Act . . . was not adopted to insulate ship owners from liability but merely to limit it to the value of the vessel *and the pending freight*.

Lake Tankers Corp. v. Henn, 354 U.S. 147, 77 S. Ct. 1269, 1271-73, 1 L.Ed.2d 1246 (1957) (emphasis added).

This Court acknowledges that other courts have held the Act applicable to pleasure boats. *See, e.g., Complaint of Boca Grande Club, Inc.*, 715 F.Supp. 341 (M.D.Fla. 1989); *In re Young*, 872 F.2d 176, 177 (th Cir. 1989); *Application of Theisen*,

349 F.Supp. 737 (E.D.N.Y. 1972); *Richards v. Blake Builders Supply, Inc.*, *528 F.2d 745 (4th Cir. 1975)*; *Matter of Shaw*, 846 F.2d 73 (table) (4th Cir. 1988), *reversing without published opinion* 668 F.Supp. 524 (S.D.W.Va. 1987). Both judges and legal scholars, however, have severely criticized the Act's application to pleasure craft in the past 30 years. *See, e.g., Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 437, 74 S.Ct. 608, 622-623, 98 L.Ed. 806 (1954) (Black, J., dissenting); *Matter of Lowing*, 635 F.Supp. 520 (W.D. Mich. 1986), *abrogated by In re Young*, 872 F.2d 176 (6th Cir. 1989); *Matter of Tracey*, 608 F.Supp. 263 (D. Mass. 1985); *Baldassano v. Larsen*, 580 F.Supp. 415 (D. Minn. 1984); *see also 7A Moore's Federal Practice* para. 215(5) (2d Ed.1988); Gilmore & Black, *The Law of Admiralty*, 882 (2d Ed. 1975).

I agree with the reasoning of the latter courts and treatises and, because I am not constrained either by the plain language of the statute or by binding precedent to find otherwise, I hold that 46 U.S.C. App. §183 does not apply to plaintiff's boat in this case.

Accordingly, claimant Lechner's motion for summary judgment is granted and the complaint dismissed with prejudice.

Appendix B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of the Complaint of Glenn R. Hechinger, as Charterer and Owner Pro Hac Vice of the Trawler WYNN D II for Exoneration from or Limitation of Liability,

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Glenn R. Hechinger,

Plaintiff-Appellee,

v.

Stewart Caskie,

Defendant-Appellant.

No. 88-2525

D.C. No. CV-86-2763-WHO

OPINION

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, District Judge, Presiding

Argued and Submitted
April 13, 1989 - San Francisco, California

Filed November 27, 1989

Before: William A. Norris, Robert R. Beezer and Melvin Brunetti, Circuit Judges.

Opinion by Judge Brunetti

SUMMARY

Admiralty

The court affirmed the district court's judgment. The court held that the liability limitation provision of the Limitation of Liability Act applies to private, non-commercial vessels.

Appellee Glenn Hechinger leased a forty-nine foot trawler ("WYNN D II") which was stored at Newport Beach, California after he briefly examined and operated it on ocean waters near Newport Beach. As he was inexperienced at ocean-going travel, Hechinger arranged with an experienced yacht broker to have the boat delivered to Hechinger to Alameda, California. The broker contacted an experienced skipper

(Stevenson) who had delivered at least fifty-eight vessels of varying sizes up the California coast. Stevenson was to make all arrangements, including hiring the crew, preparing the boat for departure, and deciding when to make the trip. Hechinger's payment for the trip expenses did not reach Stevenson in time, and Stevenson advanced his own funds to cover costs. After initial arrangements had been made, Hechinger had no further contact with Stevenson until after the boat left Newport Beach. The broker also arranged for another boat ("GIRLFRIEND III") to be delivered at the same time by another experienced skipper (Martens). Prior to embarking, Stevenson checked to see that the boat was fueled and found that the gauges signaled full. He also verified that the boat appeared to be structurally fit and safe for the trip north. Before

Stevenson and Martens set out, they discovered that WYNN D II's fuel gauges were inaccurate, and they transferred fuel from the GIRLFRIEND III. Although gale warnings were forcasted, the vessels experienced no difficulty until they reached the entrance to San Francisco Bay. Following the advice of the Coast Guard, they entered by way of the South Channel, with GIRLFRIEND III leading. The WYNN D II ran into large waves. The entire crew was in the wheelhouse, which had no handholds. Most vessels of WYNN D II's size lack such handholds. Appellant crewmember Stewart Caskie was thrown to the floor and injured. Later, large, destructive waves forced them to evacuate. The engines continued to run, unattended, for another four hours before the vessel finally sank. Stevenson petitioned for limitation of liability under the Limitation of Liability Act (46

U.S.C. §183). Caskie sought compensation under the Jones Act (46 U.S.C. §688) for negligence and under general maritime law for unseaworthiness. The district court found for Hechinger.

[1] Caskie contended that the liability limitation provision of the Act did not apply to private, non-commercial vessels. [2] Relying on the plain language of §183(a), [3] the court held that the provision did apply to pleasure boats. [4] The court also affirmed the district court's finding the proximate cause of Caskie's injury was not unseaworthiness or negligence on the part of Hechinger, noting [5] that the finding was binding on appeal unless clearly erroneous. [6] The district court found that the vessel was seaworthy, [7] that it had enough fuel for the voyage, and [8] that the skipper and crew were competent. Further, [9] Caskie

contended that Hechinger was negligent, but the district court's findings to the contrary were not clearly erroneous. Similarly, [10] Caskie alleged that Stevenson was negligent, but [11] the district court found to the contrary.

COUNSEL

Lyle C. Cavin, Jr., San Francisco, California, for the defendant-appellant.

Terrence S. Cox, Derby, Cook, Quinby & Tweedt, San Francisco, California, for the plaintiff-appellee.

OPINION

BRUNETTI, Circuit Judge:

I.

OVERVIEW

Appellant, Stewart Caskie, appeals the district court's ruling in favor of appellee, Glenn R. Hechinger. Appellee, owner *pro hac vice* of the vessel WYNN D II, petitioned for exoneration from or limitation of liability under the

Limitation of Liability Act (46 U.S.C. §183) for injuries caused when high breaking waves suddenly surrounded his vessel, and ultimately caused it to sink. Appellant suffered back injuries when the force of the sea threw him to the floor of the wheelhouse and he sought compensation under the Jones Act (46 U.S.C. §688) for negligence and under general maritime law for unseaworthiness. The district court found for Hechinger and we affirm, holding that the proximate cause of the injuries was an Act of God or peril of the sea.

STATEMENT OF FACTS

The district court made findings of fact in its Memorandum of March 16, 1988. These findings of fact shall not be set aside unless clearly erroneous, and we give due regard to the district court's opportunity to judge the credibility of the witnesses. Fed. R. Civ. P. 52(a); *Wood v. Sunn*, 852

F.2d 1205, 1208 (9th Cir. 1988); *see also Brophy v. Lavigne*, 801 F.2d 521, 524 (1st Cir. 1985) (Where credibility determinations are clearly explained, and the factual decisions are supported by the record, court of appeals must uphold trial court's judgment). The following is a summary of the district court's 58 factual findings.

The WYNN D II, a forty-nine foot trawler, was donated to the Boy Scouts of America in September 1985. In August, Robert Shadbolt & Associates surveyed the WYNN D II out of the water, finding the vessel to be fit and seaworthy, pending minor repairs which were made.

Hechinger, looking to buy a large wooden motor boat, contacted Ken Underwood, a yacht broker for the past twenty-eight years and principal of Edgewater Yachts Brokerage in Sausalito, California. They

had a common interest in classic wooden boats and had known each other for some time. The Boy Scouts, past clients of Underwood, told him that the WYNN D II was for sale and provided Underwood with photos of the boat and the August, 1985 survey. Hechinger went to Newport Beach and spent two to three hours inspecting the vessel; then he took the vessel on a sea trial lasting over two hours. However, only one half hour was spent on ocean waters. The vessel handled well with no problems.

Hechinger agreed to lease the vessel for two years, with an option to buy, and the parties have stipulated that Hechinger is the "owner" of the vessel. As Hechinger was inexperienced at ocean-going travel, Underwood arranged to have the vessel delivered to Hechinger in Alameda. Underwood, a yacht broker for the past

twenty-eight years, has often arranged for delivery of vessels.

Underwood contacted Stevenson, an experienced skipper of twenty years, who over the past twelve years has delivered at least fifty-eight vessels of varying sizes up the California coast. Underwood knew Stevenson personally and Stevenson had never suffered a casualty before the WYNN D II. Stevenson and Hechinger agreed that Stevenson would make all arrangements to bring the vessel up the coast, including hiring the crew, preparing the vessel for departure, deciding when to leave for Newport Beach and when to arrive in Alameda. Underwood arranged for the Boy Scouts to have the oil and fuel filters changed and the fuel tanks filled. Stevenson had asked Hechinger to advance $300 of the expense money. Hechinger mailed a check to Underwood's office, but

the check did not arrive in time, so Stevenson used his own money to pay for part of the airfare of the crew, the food and supplies for the voyage, taking $60 with him. The total cost of the delivery was $500 plus expenses. After these initial arrangements were made, Hechinger had no further contact with the vessel or the crew until he learned of the abandonment outside San Francisco Bay. Stevenson learned that Underwood had arranged for the GIRLFRIEND III, a sixty foot antique motor cruiser built in 1929, to be delivered at the same time. Bruce Martens, the skipper of the GIRLFRIEND III, and Stevenson arranged to travel up the coast together. Martens has lived on boats in the Bay Area his entire life and made over two hundred coastal voyages between Seattle and San Diego.

Stevenson and the crew left for Newport Beach on November 29, 1985, a Friday, and spent the rest of the day preparing for the trip. Stevenson and Caskie inspected the structural elements of the vessel, its hoses, delivery systems, navigational lights, and radio. A Boy Scout representative told Stevenson that the filters had been changed and the fuel tanks "topped off." The engine was warm and fuel could be seen near the tanks where some had spilled. The sight gauges signaled full. Stevenson was pleased that Hechinger left him to inspect the vessel himself as it was part of his normal routine. Stevenson found the vessel to be structurally fit and safe for the trip north. The crew purchased a new bilge pump after the Boy Scouts gave their permission to use their account at the marina to purchase anything

they needed. They spent that night on the WYNN D II.

Stevenson considered the first hour or two of the voyage to be the sea trial and if the vessel performed poorly, he would return to port. The WYNN D II had a 2300 RPM capacity with ideal cruising at 1800 RPM, the vessel had a slight vibration problem, which disappeared at 1500 RPM, or at eight to ten knots. The vessel lost one-half knot of speed due to the vibration problem. Stevenson still thought the vessel safe and capable of the trip to San Francisco.

The WYNN D II and GIRLFRIEND III met outside the Los Angeles Harbor. After this, the crew noticed an oil gauge read "zero" but decided, after a visual inspection, that since the engine did not overheat, the gauge was faulty. Shortly after, the generator ceased working,

shutting down the vessel's power source, including the refrigerator and stove. At about the same time, the crew noticed the gas gauges were "tucked in an awkward position," which did not allow them an accurate reading. A true reading revealed the port tank was empty and the starboard tank was only one quarter full. To be safe, the crews transferred excess fuel from the GIRLFRIEND III to the WYNN D II, using the old bilge pump, transferring 50 to 60 gallons until the pump gave out. Stevenson estimated this would be enough to get them to San Francisco.

The National Weather Service forecast gale warnings, and although the vessels encountered large rolling swells, for these large vessels the sea was comfortable up to Monterey. From Monterey on, the ocean tends to be rougher, and the skippers had to decide whether to wait for a better

forecast. The vessels spent Sunday night in Monterey, and Monday morning, in spite of the continuing forecast for storms, the skippers decided to continue as they could seek refuge at Moss Landing, Santa Cruz, or Half Moon Bay, as well as return to Monterey. They in fact had a smooth ride all the way to the South Channel to San Francisco Bay, except for some engine trouble by GIRLFRIEND III which delayed them an hour. The National Weather Service issued a small craft warning and then an advisory at 2 p.m. from Redwood City that afternoon, but both vessels were well over the thirty-five feet maximum of small crafts.

The GIRLFRIEND III was one to two hundred yards ahead of the WYNN D II as the vessels approached the South Channel entrance to the San Francisco Bay. Martens, skipper of the GIRLFRIEND III,

radioed the WYNN D II, informing them he was taking the South Channel. Stevenson said he had no objection, nor was there any objection or discussion of the decision with the crew. Pleasure yachts and small vessels used the South Channel almost exclusively, as it is only four miles long, the shortest route from the south into San Francisco Bay. The other route from the south, the Main Channel, is used by the huge shipping vessels and the coast guard publication, the *Coast Pilot* advises smaller vessels to take the South Channel to avoid the large ship traffic. The *Pilot* states that the North Channel, an alternate route, also used by smaller vessels, can be dangerous in heavy seas and large swells. Stevenson has taken the South Channel fifty-seven out of fifty-eight times he has delivered vessels from Southern California and had never encountered any problems,

although he is aware that it could contain breaking waves in stormy conditions. Martens was also very familiar with the South Channel and conditions in the Bay.

As they both approached the South Channel, visibility was four miles, with light winds and moderate seas with large rolling swells spaced far apart, similar to conditions they encountered all along the coast. Martens, still about one to two hundred yards ahead, saw no breaking waves in the Channel and in fact could see the Marin Headlands and cars on the road in the distance. He radioed WYNN D II and told them he was going into the South Channel. Stevenson, who noted the good visibility and lack of breaking waves, voiced no objection and the crew neither voiced objection nor mentioned a concern about low fuel. As the GIRLFRIEND III was halfway through the Channel, a huge breaking wave

appeared, then a second and a third. Although it is not unusual to see breaking waves in the South Channel in heavy seas and storm conditions, these were larger than any Martens had seen. The Coast Guard advised him to turn his bow to the west to reach deeper water beyond the waves. Martens did and so advised Stevenson. The WYNN D II soon found itself surrounded by twenty to twenty-five foot waves, dropping from the crest of one wave into the trough of another as Stevenson turned the vessel west to deeper water. The entire crew was in the wheelhouse, which had no handholds anywhere. Most vessels of WYNN D II's size and the overwhelming majority of vessels manufactured today do not contain handholds in the wheelhouse as standard equipment. Appellant Caskie braced himself by placing one hand on a table and the other against the dashboard, but the third roller coaster

wave threw him to the floor of the wheelhouse, where he landed on his buttocks injuring his back.

The power of the waves tore a hole in the bow of the WYNN D II and completely ripped the wheelhouse off the GIRLFRIEND III. Stevenson realized they were taking on too much water and that they had to abandon the vessel. Both skippers radioed the Coast Guard which sent out a forty foot rescue vessel. Unfortunately, the Coast Guard vessel was hit by a wave, rolled 360 degrees, and could not complete the rescue. The Coast Guard had to send a helicopter to airlift the crews off the vessels. Caskie was finally taken off the vessel about two and a half hours after the rescue call. The engine was still running at this time. One and a half hours later, the Coast Guard rescued the remaining crew members, four hours after the initial call. The vessel

did not run out of fuel, if at all, until this final evacuation occurred.

II.

DISCUSSION

A. *Jurisdiction*

The district court assumed jurisdiction of this case under the Limitation of Liability Act (the "Act"), 46 U.S.C. §§181 et seq. (1989). Under the Act, a shipowner faced with liability arising out of a single voyage may petition the appropriate federal district court for exoneration from liability or limitation of liability to the value of the ship itself. The court, upon obtaining control of the ship or the value of the ship from the petitioner, may enjoin all claimants from maintaining separate suits and require them to file all of their claims in the limitation proceeding. The court then determines whether the shipowner is liable to any of the claimants and, if

so, whether the shipowner's liability is limited under the Act to the value of the ship. Based on these determinations, the court may apportion the value of the ship among the claimants.

[1] Appellant contends that the liability limitation provision of the Act, 46 U.S.C. §183(a), does not apply to private, non-commercial vessels ("pleasure boats") such as the one at issue here. We disagree.

[2] The Sixth Circuit has held that the liability limitation provision of the Act does apply to pleasure boats. *In re Young*, 872 F.2d 176 (6th Cir. 1989). *Young* reaffirmed the rule of the Sixth Circuit, based on the plain wording of Section 183(a), that the liability limitation applies to "any vessel," including pleasure boats. The *Young* court noted that all Supreme Court and circuit court decisions

to date are consistent with this decision, *id.* at 177, and that holding otherwise would be an attempt to "judicially legislate." *Id.* at 178.

[3] We find the reasoning in *Young* persuasive. Accordingly, we hold that the limitation provision applies to pleasure boats, and that the district court had jurisdiction to hear this case.

B. *Liability Under General Maritime Law Or The Jones Act*

Once a proper limitation of liability petition has been filed, the court "must [first] determine what acts of negligence or conditions of unseaworthiness caused the accident." *Petition of M/V Sunshine, II*, 808 F.2d 762, 764 (11th Cir. 1987) (quoting *Farrell Lines, Inc. v. Jones*, 530 F.2d 7, 10 (5th Cir. 1976)). That is, a liability must be shown to exist. "The whole doctrine of limitations of liability

presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit." *Northern Fishing & Trading Co., Inc. v. Grabowski*, 477 F.2d 1267, 1272 (9th Cir. 1973)).

[4] The district court found that the proximate cause of Caskie's injury was an Act of the or peril of the sea and not unseaworthiness or negligence on the part of the owner. We affirm and find this dispositive of all other issues in the case.

[5] Proximate cause is generally a mixed question of law and fact, *Lies v. Farrell Lines, Inc.*, 641 F.2d at 770, but in this circuit it is a question for the fact finder, whose determination is binding on appeal unless clearly erroneous. *In Re White Cloud Charter Boat Co., Inc.*, 813 F.2d 1513, 1517 (9th Cir. 1987); *Armstrong v. United States*, 756 F.2d 1407, 1409 (9th

Cir. 1985). There is a split in the circuits concerning the standard of review in an admiralty court's determination of negligence and apportionment of fault. *See Waterman Steamship Corp. v. Gay Cottons*, 414 F.2d 724, 735 n.27 (9th Cir. 1969) (and cases cited therein).

1. *Unseaworthiness under general maritime law.*

If the WYNN D II was unseaworthy at the time the injury occurred and the unseaworthiness was the cause of the injury, then the owner cannot claim limitation of liability under the Act. *Sea Shipping Co. v. Sierachi*, 328 U.S. 85, 93-94 (1946). If the unseaworthiness causes injury or death, the privity or knowledge of the master at or prior to the commencement of a voyage shall be deemed conclusively the privity and knowledge of the owner of such vessel. 46 U.S.C.

§183(e); *Waterman*, 414 F.2d at 728 n.10. "A boat owner's liability for unseaworthiness 'is a form of absolute duty owing to all within the humanitarian range of its humanitarian policy.'" *Armour v. Gradler*, 448 F.Supp. 741 (W.D. Pa. 1978) (quoting *Seas Shipping Co.*, 328 U.S. at 95). In essence, the doctrine requires that the vessel, including the hull, the decks, or the machinery, be reasonable fit for the purpose for which they are used. *Gutierrez v. Waterman S.S. Corp.* 373 U.S. 206 (1963).

The person claiming liability under the doctrine must first show that he was "in the ship's service" and the warranty extends to him. *Gebhard v. S.S. Hawaiian Legislator*, 425 F.2d 1303, 1310 (9th Cir. 1970). Here the district court found, and it is not disputed, that Caskie was a Jones Act seaman bringing him within the scope of

the warranty of seaworthiness. *See* District Court's Conclusion of Law No. 2. Secondly, the claimant must show that the injury was caused by a piece of the ship's equipment or an appurtenant appliance. *Gebhard* at 1312. The third element is that the equipment used was not reasonably fit for its intended use. *Id.* The burden of proof to show unseaworthiness was on Caskie, the claimant. *Northern Fishing & Trading Co.*, 477 F.2d at 1271-72. Caskie contends that the WYNN D II was unseaworthy in that 1) the vessel lacked handholds in the wheelhouse; 2) the vessel lacked adequate fuel or the means to obtain fuel to complete the voyage; 3) the skipper was incompetent; 4) the vessel had a vibration problem.

[6] The district court found the vessel to be seaworthy. Conclusion of Law No. 12. Specifically, the district court found that

the lack of handholds did not render the vessel unseaworthy, and that the vessel was "structurally fit and reasonably safe for the voyage." *Id.* Handholds are not standard equipment on presently manufactured vessels. *Id.* A ship only need be "reasonably suitable" to the purpose it was intended. *Litherland v. Petrolane Offshore Const. Services*, 546 F.2d 129, 133 (5th Cir. 1977). "The warranty of the ship owner is not one of unconditional safety, but of fitness for duty of that which functions to provide the service tendered by the ship in the carriage of goods or people." *Smith v. American Mail Line, Ltd.*, 525 F.2d 1148, 1150 (9th Cir. 1975).

[7] The district court also found that the WYNN D II had enough fuel for the voyage. This is not error as the court found that the engine in the ship was still

running when Caskie was rescued and did not stop until at least four hours after their call to the Coast Guard. Factual Finding No. 54. Also, no concern over lack of fuel was voiced when the decision was made to enter the South Channel. Factual Findings Nos. 47, 48. Thus, there is no causation between the lack of fuel and the loss of the vessel or Caskie's fall. Legal Conclusion No. 12.

[8] The district court found that the skipper and the crew were competent and did not render the vessel unseaworthy. Legal Conclusion No. 12. The skipper, Stevenson, had made 58 similar vessel deliveries and this was the first vessel he had lost. All the crew members all had ocean going experience. The tasks performed on the vessel, from Stevenson's inspection prior to departure, to the decision to go with the GIRLFRIEND III, to the transferring of

fuel in Monterey, to the vessel's entrance into the Bay, were performed with reasonable competence. *See* Factual Findings Nos. 21, 27, 38, 46-50. Lastly, the vibration problem did not render the WYNN D II unseaworthy. The court found that the vessel lost only a half knot of speed by running at a low RPM. Factual Finding No. 33. The court found that the vessel ran smoothly at 1500 RPM and traveled at an "adequate pace of eight to ten knots." Conclusion of Law No. 12. Caskie cannot show that the vessel was unseaworthy. Hence Hechinger cannot be liable for "unseaworthiness."

2. *Negligence under the Jones Act.*

If the owner is not liable for "unseaworthiness," then Caskie must show negligence caused his injury, else there wil be no owner liability to limit. *See Northern Fishing & Trading Co., Inc.*, 477

F.2d at 1271-72. To recover under a Jones Act claim, "[t]he plaintiff has the burden of establishing by a preponderance of the evidence, negligence on the part of his employer or one for whom the employer is responsible." *Litherland v. Petrolane Offshore Const. Services*, 546 F.2d at 133. Then, the claimant must establish that the act of negligence was a cause, however, slight, of his injuries. *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 771 (9th Cir. 1981) (citing *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506-07 (1957) (discusses proximate cause required under FELA, and thus the Jones Act by reference); *see* 46 U.S.C. §688 (Jones Act expressly provides for seamen the cause of action and judicially developed doctrine of liability granted to railroad workers by FELA). While the district court's determination of the absence of negligence is subject to the

clearly erroneous standard, *In Re White Cloud Charter Boat Co., Inc.*, 813 F.2d at 1517, whether a claim has been stated under the Jones Act is a question of law subject to de novo review. *Dalla v. Atlas Maritime Co.*, 771 F.2d 1277, 1278 (9th Cir. 1985) (and cases cited therein).

[9] Caskie argues that owner-Hechinger was negligent in five ways: 1) negligent hiring of Stevenson; 2) neglecting to give Stevenson adequate expense money, including money for fuel; 3) setting time constraints that prevented proper inspection of the vessel and hurried their arrival to San Francisco; 4) relying on a three month old survey of the vessel; and 5) failing to instruct Stevenson to ascertain whether the vessel was seaworthy before departing. The district court found that Hechinger's reliance on Underwood to find him a skipper was prudent and reasonable. Conclusion of

Law No. 13. Hechinger knew Underwood having dealt with him before and Underwood had been in the brokerage business for twenty-eight years which included numerous vessel deliveries. The court further found that even if Hechinger was negligent in failing to provide Stevenson with expense money, that any problem resulting in a fuel shortage was cured when the WYNN D II transferred fuel from the GIRLFRIEND III. Also, the decision to take the South Channel had nothing to do with any concern over fuel, so that negligence, if any, did not proximately cause the accident. Although Caskie claims there were time constraints, the evidence fails to show that Hechinger was concerned about time of arrival or that time constraints entered into any navigational decision. The trip was delayed a week so the two vessels could travel up the coast together. Stevenson

took the time to inspect the vessel before they left. Even though Hechinger relied on a three month old survey, this reliance did not cause the accident as Stevenson inspected the vessel finding it structurally and operationally fit for the voyage. Likewise, Hechinger's failure to tell Stevenson to inspect the vessel did not cause any harm. The district court's findings are supported by the evidence and not clearly erroneous and its legal conclusions are reasonable under a de novo review.

[10] Caskie also alleges that Stevenson was negligent in a variety of ways. However, Stevenson's failure to properly read the fuel gauges was "cured" in Monterey when the WYNN D II took fuel from the GIRLFRIEND III. Stevenson's decision to leave Monterey, in spite of predicted adverse weather conditions, was prudent in

that the vessel could have sought refuse at Moss Landing, Santa Cruz or Half Moon Bay or returned to Monterey. As it turns out, the weather conditions up to San Francisco Bay were calm and comfortable. The district court discussed Stevenson's decision to take the South Channel into San Francisco Bay at length. First, the South Channel was recommended by the *Coast Pilot* as large shipping vessels frequent the Main Channel and the North Channel is dangerous in stormy conditions. Second, the National Weather Forecast at 2:00 p.m. on the day of the accident predicted moderate seas with heavy swells and issued a small crafts warning, inapplicable to the forty-nine foot WYNN D II as small crafts are vessels thirty-five feet or smaller. This was later changed to an advisory and it applied tot he area outside the San Francisco Bay, not just the South Channel. Third, the

visibility was at least four miles as Stevenson and Skipper Martens could see the Marin Headlands. The WYNN D II encountered diminishing seas and winds and neither Stevenson nor Martens, skipper of the GIRLFRIEND III, saw any breaking waves in the Channel. Fourth, the GIRLFRIEND III, without objection or voiced concern from the crew of WYNN D II, went first into the channel, essentially acting as a lookout for the WYNN D II. The district court found that Stevenson and Martens both weighed the high visibility, the favorable conditions and the fact that the South Channel is usually used by smaller vessels, with the possibility of breaking waves in the South Channel during stormy conditions and other possible dangers. The district court made a factual finding that the conditions turned from comfortable to dangerous in a matter of minutes and that

huge breaking waves appeared out of nowhere. The Coast Guard instructed the GIRLFRIEND III to turn its bow west and head for deeper water which both skippers did.[7] The district court concluded that there was no negligence in the actions of Stevenson or the crew in the navigation of WYNN D II. Caskie's arguments that Stevenson should have known that breaking waves of that size and the fact it came up quickly existed in the South Channel benefits from hindsight. At the time, the conditions indicated that the South Channel was the safest route. The Coast Guard cutter that came to rescue them did a 360 turn in the breaking waves and turned back, showing that even the Coast Guard was caught unawares and could not predict the conditions.

[11] The district court concluded that because the vessel was safe and seaworthy,

and no negligence existed on the part of Hechinger or Stevenson and the WYNN D II crew, that the cause of the accident was an Act of God or peril of the sea. Hence, there is no liability on the part of Hechinger, and thus, no liability to limit.

III.

CONCLUSION

The district court's findings of fact are not clearly erroneous and its conclusions of law based on those findings are reasonably supported by the evidence. The district court's judgment is affirmed.

AFFIRMED.